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No. 82-1473

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DIXIE FINANCE COMPANY, INC., and
TRANSOUTH FINANCIAL CORPORATION,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF AMICUS CURIAE OF SHERMAN A. BERNARD, COMMISSIONER OF INSURANCE, STATE OF LOUISIANA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

HERSCHEL C. ADCOCK*
ADCOCK, DUPREE, SHOWS & CLEGG
POST OFFICE DRAWER 3037
821 MAIN STREET
BATON ROUGE, LOUISIANA 70821
(504) 383-5276
Attorney for Amicus Curiae

* Counsel of Record

April 1983

QUESTION PRESENTED

Whether the Federal Trade Commission is prohibited by the McCarran-Ferguson Act from investigating within the State of Louisiana the sale of insurance by licensed insurance agents.

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STATEMENT OF INTEREST OF AMICUS CURIAE

This brief amicus curiae is filed by Sherman A. Bernard, Commissioner of Insurance, State of Louisiana, pursuant to Rule 36(4).

In 1948 the Louisiana legislature codified the insurance laws into the Louisiana Insurance Code. As insurance is a business affected with the public interest, the purpose of the Code is to regulate the business of insurance in all its phases. The duty of the Commissioner of Insurance is to administer the provisions of the Insurance Code. La. R.S. 22:2 (A)(1).

If the opinion of the lower court is upheld, the decision in this case may allow the Federal Trade Commission to regulate the sale of insurance and establish federal policies in the State of Louisiana, thereby usurping the authority of the State of Louisiana, through the Commissioner of Insurance, to regulate the business of insurance. As this case was instituted in the District Court for the Eastern District of Louisiana, and involves a determination as to whether the state or

federal government is authorized to regulate the business of insurance in the State of Louisiana, the Louisiana Commissioner of Insurance has an interest in the resolution of this matter.

STATEMENT

As was discussed in *Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 458, 89 S.Ct. 564, 567, 21 L.Ed.2d 668 (1969), the McCarran-Ferguson Act, 15 U.S.C. 1011 et seq., was passed in reation to this Court's decision in *United States v. South-Eastern Underwriters Association,* 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944). Prior to that decision it was assumed that the states had plenary jurisdiction over the business of insurance. In *Paul v. Virginia,* 8 Wall. 168, 183, 19 L.Ed. 357 (1869), it was stated that "[i]ssuing a policy of insurance is not a transaction of commerce." As a result, the regulation of insurance transactions was believed to rest exclusively with the States until the *South-Eastern Underwriters* decision was rendered. In *South-Eastern Underwriters,* this Court held that insurance transactions were subject to federal regulation under the Commerce Clause. In reaction to the *South-Eastern Underwriters* decision, Congress passed the McCarran-Ferguson Act, which provides in Section 1:

> Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Section 2 of the Act provides:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Harboring suspicions that consumer finance companies mislead customers into obtaining credit insurance, the Federal Trade

Commission instituted a nation-wide investigation. The scope of the investigation is to determine if consumer finance companies and automotive dealers are engaged in unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The stated purpose of the investigation "is to determine whether companies engaged in the business of consumer financing may be misrepresenting the optional status of credit insurance to prospective borrowers." The FTC issued civil investigative demands (CIDs), a type of subpoena, to numerous finance companies seeking documentary evidence related to the companies' sales of insurance in connection with the extension of credit. Two of the consumer finance companies served with the CIDs, Dixie Finance Company, Inc. and Transouth Financial Corporation, failed to produce the requested information.

The FTC subsequently initiated enforcement proceedings against Dixie Finance Company, Inc. and Transouth Financial Corporation in the District Court for the Eastern District of Louisiana. The District Court ordered production of the documentary evidence having found that the scope of the investigation was not protected by the McCarran-Ferguson Act. The basis of the Court's decision was that the methods used to induce potential borrowers to purchase insurance is an integral part of the arrangement of credit and is not the "business of insurance" within the meaning of the Act.

On appeal, the decision was affirmed, with one dissent, on the basis of the district court's opinion. A majority of the panel found "that the conduct being investigated by the Federal Trade Commission did not relate to respondents as insurers but as finance companies whose methods of inducing potential borrowers to purchase insurance is an integral part of the arrangement of credit and not the 'business of insurance' was eminently correct."

In his dissent, Judge Reavley, found that the McCarran-Ferguson Act barred application of the provisions of the FTC Act. Following the decision of *Group Life & Health Insurance Company v. Royal Drug Company,* 440 U.S. 205, 211, 99 S.Ct. 1067, 1073, 59 L.Ed.2d 261 (1979), which held that the McCarran-Ferguson Act exemption is for the "business of insurance" rather than the "business of insurers", he determined that it was irrevelant that the defendants were consume finance or small loan companies. The relevant inquiry was the nature of the transactions. *Perry v. Fidelity Union Life Insurance Company,* ;606 F.2d 468, 470 (5th Cir. 1979), *cert denied,* 446 U.S. 987, 100 S.Ct. 2973, 64 L.Ed.2d 845 (1980). Analyzing the transaction at issue, Judge Reavley found that it constituted the "business of insurance." As he stated "[w]hen a finance company tells a borrower/buyer that he must buy an insurance policy in order to complete the desired transaction, the

finance company is selling insurance. If the borrower/buyer accedes to the selling tactic and agrees to buy the insurance, only then does the activity move to the financing of the cost of that insurance." The dissent further found that the "business of insurance" as is present in this situation is governed by state law and that application of the FTC Act would "invalidate, impair, or supercede such state law in contravention of the McCarran Act exemption."

ARGUMENT

Amicus curiae submits that the sale of insurance is adequately regulated under state law and that the investigation of insurance by the FTC within the State of Louisiana would invalidate, impair, or supersede Louisiana law in contravention of the McCarron-Ferguson Act. Even though the sale of credit insurance is the focus of the FTC investigation and thus the application for a writ of certiorari, amicus curiae submits this brief for the purpose of discussing whether the sale of any type of insurance may be investigated by the Federal Trade Commission.

I. THE SCOPE OF REGULATION OF THE BUSINESS OF INSURANCE IN THE STATE OF LOUISIANA AUTHORIZES THE COMMISSIONER OF INSURANCE TO REGULATE THE SALE OF INSURANCE IN GENERAL AND SPECIFICALLY MANDATES THE COMMISSIONER OF INSURANCE TO REGULATE THE SALE OF INSURANCE TO PREVENT UNFAIR OR DECEPTIVE ACTS AND PRACTICES.

As stated earlier, Louisiana has codified its insurance laws into an Insurance Code, La. R.S. 22:1 et seq., the provisions of which are administered by the Commissioner of Insurance. Insurance has long been held to be a business affected by the public interest. To that end the Louisiana legislature has enacted numerous statutes concerning the various phases of the insurance business.

As no person may act as an insurer in Louisiana unless properly qualified, statutes have been enacted regulating the entities which are permitted to transact the business of insurance. Those types of insurers include, inter alia, life insurers, the regulations for which are contained in La. R.S. 22:161 et seq. These regulations include the requirement of filing annual reports, an annual valuation of reserves, the inclusion of certain standard policy provisions and prohibitions against the inclusion of others, and regulations for group life insurance. Health and accident insurance is regulated by La. R.S. 22:211, et seq. The regulations include the requirements for filing of policy forms, rates for accident and health insurance, and the basis for approval or disapproval. In addition to the statutory requirements, the Commissioner of Insurance has established minium capital requirements for the different types of insurance companies. (Appendix A). Furthermore, the Commissioner of Insurance licenses qualified insurance agents, as well as foreign or alien insurers, La. R.S. 22:1111 et seq. and La. R.S. 22:981 et seq. The Commissioner furthermore is

mandated to periodically examine and investigate all insurers doing business in this state. La. R.S. 22:1301 et seq.

Additionally, Louisiana has enacted statutes to regulate unfair trade practices in accordance with the intent of Congress as expressed in the McCarron-Ferguson Act. La. R.S. 22:1211. Under this chapter of the Insurance Code, the engaging in trade practices which are defined to be an unfair method of competition or an unfair or deceptive act or practice in the conduct of business of insurance are prohibited. La. R.S. 22:1213. La. R.S. 22:1214 enumerates the methods, acts and practices which are defined as unfair or deceptive. (Appendix B). The Commissioner of Insurance is authorized to examine and investigate the affairs of every person engaged in the business of insurance in order to determine whether such person has been or is engaged in any unfair method of competition or in any unfair or deceptive act or practice. La. R.S. 22:1215. In the event the Commissioner has reason to believe that any person is engaging in any unfair method of competition or in any unfair or deceptive act or practice in the conduct of an insurance business, the Commissioner shall serve upon that person a statement of the charges and a notice of a hearing. La. R.S. 22:1216. If after the hearing, the Commissioner determines that there has been a violation, he is mandated to issue a cease and desist order. La. R.S. 22:1217(A). The Commissioner may seek enforcement of the cease and desist order by filing suit. Violation of the order will result in the imposition of penalties. La. R.S. 22:1217(B).

In addition to the statutes referred to above, the Louisiana Consumer Credit Act, La. R.S. 9:3510 et seq., contains provisions relating to insurance in a consumer credit transaction. La. R.S. 9:3542(A) provides that in any consumer credit transaction, an extender of credit may request or require a consumer to provide credit life insurance and credit health and accident insurance as additional security for such contract agreement. The cost of such insurance, if required by the extender of credit, is deemed to be a portion of the credit service charge or loan finance charge for the purpose of computing maximum rates. The extender of credit may additionally request or require a consumer to insure property involved in such contract or agreement. La. R.S. 9:3543. Any insurance which is provided, sold or obtained through an extender of credit must be written at lawful rates and in accordance with the provisions of the Louisiana Insurance Code by a company authorized to do business in the State. The contract or agreement must briefly indicate the kind, coverage, term and the amount of premium for such insurance. La. R.S. 9:3545. In the event that insurance is required or requested, the consumer has the privilege of purchasing the insurance from an agent or broker of his own choice and seleting an insurance company acceptable to the extender of credit. La. R.S. 9:3546. If the

insurance is terminated or cancelled for any reason, the refund for unearned insurance premiums may, at the option of the extender of credit, be applied toward payment of the premium of alternate insurance or towards payment of the unpaid balance of the consumer credit transaction. La. R.S. 9:3548.

Under the laws of the State of Louisiana, the Commissioner of Insurance is authorized to regulate the sale of every type of insurance. Specifically, the Louisiana legislature has authorized the Commissioner of Insurance to regulate insurers to prevent unfair or deceptive acts and practices in the sale of insurance. Therefore, there is no necessity for the FTC to regulate the sale of insurance in the State of Louisiana.

If the decision of the Fifth Circuit Court of Appeals is affirmed, it is likely that the FTC or another federal agency would establish federal standards of fairness with the regard to the sale of insurance policies, which standards would be effective nationwide. This is an unnecessary and unwarranted intrusion into matters which Congress has decided are the strict province of the state. 15 U.S.C. 1012. In *Prudential Insurance Company v. Benjamin,* 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946), Mr. Justice Rutledge discussed the purpose of the McCarran-Ferguson Act, stating that it was obvious that Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. Mr. Justice Rutledge concluded that Congress intended to declare, and in effect did declare, that uniformity of regulation was not required in reference to the business of insurance by the national public interest, except in the specific respects expressly provided for in the Act.

II. THE METHODS USED TO SELL INSURANCE POLICIES BY LICENSED AGENTS OF INSURANCE COMPANIES IS THE BUSINESS OF INSURANCE.

The decision of the Court of Appeals allows the FTC to continue an investigation of the sale of insurance, which investigation exceeds the authority of the FTC. The Court of Appeals decision is inconsistent with the decision of this court in *Federal Trade Commission v. National Casualty Co.,* 357 U.S. 560, 78 S.Ct. 1260, 2 L.Ed.2d 1540 (1958), and conflicts with two Court of Appeals decisions.

In *FTC v. National Casualty Co.,* supra, this court held that the regulation of insurance advertising practices was within the jurisdiction of the states. In a per curiam decision, the Court stated that the McCarran-Ferguson Act "withdrew from the Federal Trade Commission the authority to regulate respondents' advertising practices in those States which are regulating those practices under their own laws."

In *Securities and Exchange Commission v. National Securities, Inc.*, supra, the Court in referring to the McCarron-Ferguson Act stated, "[t]he statute did not purport to make the States supreme in regulating all the activities of insurance companies; its language refers not to the persons or companies who are subject to state regulation, but to laws 'regulating the business of insurance.' " The court also stated that the core of the "business of insurance" is the relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement. The Court held that section 10(b) of the Securities Exchange Act, 15 U.S.C. 78j(b), applied to insurance companies despite the McCarran-Ferguson Act and distinguished between regulation of "the relationship between the insurance company and the policyholder," which is peculiar to the "business of insurance" and is governed by the McCarran-Ferguson Act, and regulation of the "relationship between a stockholder and the company in which he owns stock."

The Second and Ninth Circuits have held that the practice of conditioning loans on the purchase of insurance was the business of insurance. *Dexter v. Equitable Life Insurance Society of the United States,* 527 F.2d 233 (2d Cir. 1975) and *Addrisi v. Equitable Life Assurance Society of the United States,* 504 F.2d 725 (9th Cir. 1974), *cert. denied,* 420 U.S. 929, 95 S.Ct. 1129, 43 L.Ed.2d 400 (1975).

However, the Fifth Circuit was of the opinion that these cases had lost their viability and were distinguishable in light of *Group Life & Health Insurance Company v. Royal Drug Company,* supra. *Royal Drug* concerned agreements between pharmacies and insurance companies to fix the price of drugs, with the Court in effect finding that the activity in question was the business of insurers and not the business of insurance. In construing the *Royal Drug* decision, the Fifth Circuit found that "[i]n both *Dexter* and *Addrisi* the practices under attack were being performed by insurance companies and concerned the relationship between the insurer and the policyholder. Were the respondents in this matter insurance companies, the holdings of *Dexter* and *Addrisi* might carry more weight". The Fifth Circuit concluded that the conduct being investigated did not relate to respondents as insurers, but as finance companies whose methods of inducing potential borrowers to purchase insurance is an integral part of the arrangement of credit and not the "business of insurance." As stated by Judge Reavley in his dissent, "This looks at the Court's holding in *Royal Drug* upside down. The Supreme Court in that case held that the McCarran Act exemption is for the 'business of insurance', not the 'business of insurers'."

At issue in this matter is the agreement between the insured and the inurer, or the business of insurance. Contrary to the decision of the Fifth Circuit, the conduct which the FTC seeks to investigate and thereby regulate is the purchase of insurance, the regulation of which is reserved to the states by the McCarron-Ferguson Act.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

HERSCHEL C. ADCOCK*
ADCOCK, DUPREE, SHOWS & CLEGG
821 MAIN STREET
POST OFFICE BOX 3037
BATON ROUGE, LOUISIANA 70821
TELEPHONE: (504) 383-5276
Attorney for Amicus Curiae

* Counsel of Record

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EXHIBIT A

	1 Paid in Capital	2 Statutory Minimum Surplus	3 Operating Surplus
Industrial Fire	$200,000	$100,000	$100,000
Industrial Life	30,000	30,000	30,000
Life, Health and Accident	100,000	200,000	200,000
Fire and Casualty	1,000,000		500,000
Title	50,000	25,000	25,000
Auto Physical Damage	100,000	150,000	100,000

New companies must maintain 1, 2, and 3. Existing companies must maintain 1 and 2.

EXHIBIT B

La. R.S. 22:1214 provides:

The following are declared to be unfair methods of competition and unfair or deceptive acts or practices in the business of insurance:

1. Misrepresentations and false advertising of policy contracts. Making, issuing, or circulating, or causing to be made, issued, circulated, any estimate, illustration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby, or the dividends or share of the surplus to be received thereon, or making any false or misleading statement as to the dividends or share of surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation to any policyholder insured in any insurer for the purpose of inducing or tending to induce such policyholder to lapse, forfeit, or surrender his insurance, or making any representation that the promised coverage is available to groups of persons when such persons do not fall within groups defined in this Code. In case of advertisements of policies providing health, accident, sickness or medical benefits where such policies are either cancellable or renewable at the option of the insurer, such advertisements shall contain a statement to that effect in prominent type, and when details of benefits provided by a particular policy or plan of accident or health insurance are set forth in any advertising material, such advertising material shall disclose the major limitations of such policy or plan as well as the coverage advantage or benefits offered or promised.

2. False information and advertising generally. Making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio or television station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive or misleading.

3. Defamation. Making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abbetting or encouraging the making, publishing, disseminating or circulating of any oral or written statement or any pamphlet, circular, article or literature which is false, or

maliciously critical of or derogatory to the financial condition of an insurer, and which is calculated to injure any person engaged in the business of insurance.

4. Boycott, coercion and intimidation. Entering into any agreement to commit or by any concerted action committing any act of boycott, coercion or intimidation resulting or tending to result in unreasonable restraint of, or a monopoly in, the business of insurance.

5. False financial statement. Filing with any supervisory or other public official, or making, publishing, disseminating, circulating or delivering to any person, or placing before the public, or causing directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false statement of financial condition of an insurer with intent to deceive.

Making any false entry in any book, report or statement of any insurer with intent to deceive any agent or examiner lawfully appointed to examine into its condition or into any of its affairs, or any public official to which such insurer is required by law to report, or which has authority by law to examine into its condition or into any of its affairs, or, with like intent, wilfully omitting to make a true entry of any material fact pertaining to the business of such insurer in any book, report or statement of such insurer.

6. Stock operations and advisory board contract. Issuing or delivering or permitting agents, officers, or employees to issue or deliver, agency company stock or other capital stock, or benefit certificates or shares in any corporation, or securities or any special advisory board contracts or any other contracts of any kind promising returns and profits as an inducement to insure.

7. Unfair discrimination. (a) Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract, provided that, in determining the class, consideration may be given to the nature of the risk, plan of insurance, the actual or expected expense of conducting the business or any other relevant factor.

(b) Making or permitting any unfair discrimination between individuals of the same class involving essentially the same hazards in the amount of premium, policy fees, or rates charged for any policy or contract of health or accident insurance or in the benefits payable thereunder, or in any of the terms and conditions of such contract, or in any other manner whatever, provided that, in determining the class, consideration may be given to the nature of the risk, plan of insurance,

the actual or expected expense of conducting the business or any other relevant factor.

(c) Violating the provisions of R.S. 22:652.

(8) Rebates. Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of insurance including life insurance, life annuity or health and accident insurance, or agreement as to such contract other than as plainly expressed in the contract issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance, or annuity, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract; or giving, or selling, or purchasing or offering to give, sell, or purchase as inducement to such insurance or annuity or in connection therewith, any stock, bonds, or other securities of any insurer or other corporation, association, or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the contract.

Nothing in paragraph (7) or this paragraph (8) of this Sub-section shall be construed as including within the definition of discrimination or rebates any of the following practices.

(a) Paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from non-participating insurance provided that any such bonuses or abatement of premiums shall be fair and equitable to policyholders and for the best interest of the insurer and its policyholders;

(b) In the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have paid premiums in advance or continuously for a specified period made premium payment directly to an office of the insurer in an amount which fairly represents the saving in collection expense;

(c) Readjustment of the rate of premium for a group insurance policy based on the loss or expense experience thereunder, at the end of the first year or of any subsequent year of insurance thereunder, which may be made retroactive only for such policy year;

(d) Agents accepting on their own responsibility, notes for the first premiums.

9. Requiring as a condition precedent to lending money upon the security of a mortgage on movable or immovable property that the borrower negotiate any policy of insurance covering such property through a particular insurance agent or agents, company or companies,

type of company or types of companies, broker or brokers. Provided, however, that this provision shall not prevent the exercise by any mortgagee of his right to approve the insurer selected by the borrower on a reasonable non-discriminatory basis related to the solvency of the company and its ability to service the policy. The mortgagee may require that the amount of insurance be at least in an amount to protect the amount of the loan on a type of policy furnishing reasonable protection to the mortgagee in a form selected by the borrower which may include additional coverages not inuring to the benefit of the mortgagee and reasonably associated or connected with the property which is the subject of the loan or mortgage. Notwithstanding the provisions of R.S. 22:1212, any lender either directly or indirectly requiring a borrower to furnish insurance upon such property shall be subject to the conditions and prohibitions of this paragraph.

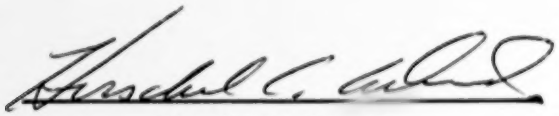
10. Issuing or causing to be issued at a premium rate less than the approved or customary rate any policy of insurance of any type or description upon life or property whenever suh policy is to be furnished or delivered to the purchaser or pledgee or mortgagee of any property as an inducement to purchase or hypothecate said property, provided that nothing in the paragraph or in this act shall prohibit the issuance of creditor group life insurance, or creditor group health and accident insurance.

11. No person, as defined in R.S. 22:5(6), shall directly or indirectly participate in any plan to offer or effect any kind or kinds of life or health insurance and annuities as an inducement to or in connection with the purchase by the public of any goods, securities, commodities, services or subscriptions to periodicals. This paragraph shall not apply to such insurance, written in connection with an indebtedness, one of the purposes of which is to pay the indebtedness in case of the death or disability of the debtor. Nor shall this paragraph apply to the sale by life insurance agents, or by life insurance agents, or by life insurance companies of equity products, including equities, mutual funds, shares of investment companies, variable annuities, and including face amount certificates of regulated investment companies under offerings registered with the Federal Securities and Exchange Commission.

12. Any violation of any prohibitory law of this state.

CERTIFICATE

I, Herschel C. Adcock, hereby certify that a copy of the above and foregoing "Brief of Amicus Curiae, Sherman A. Bernard, Commissioner of Insurance, State of Louisiana" has been served on all counsel of record through the United States Mail with proper postage affixed on this 18th day of April, 1983, at Baton Rouge, Louisiana.



Herschel C. Adcock